UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES E. HOWARD, Chapter 11 Trustee, Bangor and Aroostook Railroad Company and Van Buren Bridge Company,	)	
Plaintiff	)	
v.	)	***Misc. No. 03-63-P-S***
CANADIAN NATIONAL RAILWAY COMPANY, et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

Defendants Canadian National Railway Company ("CN") and Waterloo Railway Company ("Waterloo") (both, "Defendants") move pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), 12(e) and 12(h)(3) to dismiss the instant adversary proceeding arising from the chapter 11 bankruptcy case of the Bangor and Aroostook Railroad Company ("BAR") and the Van Buren Bridge Company ("VBB"). *See* Motion of Canadian National Railway Company and Waterloo Railway Company To Dismiss Complaint, etc. ("Motion To Dismiss") (Docket No. 11) at 1-2; *see also generally* Complaint of Trustee, etc. ("Complaint") (Docket No. 13). For the reasons that follow, I recommend that the court (i) dismiss Count III of the Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted and (ii) stay action on the remaining counts (Counts I-II and IV-X) pending disposition by

the Surface Transportation Board ("STB") of an adverse-abandonment action filed by James E. Howard, trustee of the BAR and VBB estates ("Trustee").[1]

I. Applicable Legal Standards

"In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

Ordinarily, in weighing a Rule 12(b)(6) motion, "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy*, 267 F.3d at 33. "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citation and internal quotation marks omitted); *see also, e.g., Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) ("When the factual allegations of a complaint revolve around a document whose authenticity is unchallenged, that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).") (citations and internal quotation marks omitted).

With respect to the primary-jurisdiction doctrine, the First Circuit recently has explained:

[1] The Trustee also seeks a hearing on the instant motion. *See* Trustee's Motion for Leave To File Surreply and Request for Oral Argument ("Ancillary Motion") (Docket No. 25). Inasmuch as the parties' papers provide a sufficient basis on (*continued on next page*)

> In a nutshell, the primary jurisdiction doctrine permits and occasionally requires a court to stay its hand while allowing an agency to address issues within its ken. Although sometimes treated as a mechanical and rigid requirement, the modern view is more flexible, and the decision usually depends on whether a reference will advance the sound disposition of the court case and whether failure to refer will impair the statutory scheme or undermine the agency to which the reference might be made.

United States Pub. Interest Research Group v. Atlantic Salmon of Me., LLC, 339 F.3d 23, 34 (1st Cir. 2003) (citations omitted).

II. Factual and Procedural Context

An STB decision issued on June 25, 2002 nicely summarizes the backdrop to the instant dispute:

> The Fraser Paper Company (Fraser) plant at Madawaska, ME, has long been served by joint through service provided by BAR and CN. BAR moves cars between Fraser's plant at Madawaska and an interchange junction with CN at St. Leonard, Canada ["Madawaska Line"]. CN provides long haul service beyond the interchange. BAR owns the track involved in this movement between Madawaska (BAR milepost 0.0) and Van Buren (Canadian Junction), ME (BAR milepost 22.72). BAR's wholly owned subsidiary, the Van Buren Bridge Company (VBBC), owns the track between Van Buren (VBBC milepost 0.0) and the interchange with CN at St. Leonard, Canada. BAR trains cross the St. Johns River over a VBBC railroad bridge at the Canadian border at VBBC milepost 0.31. Before March 2001, BAR and CN quoted a joint rate for the service and agreed upon a division of this rate.
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> In March 2001, CN and BAR terminated the joint rate arrangement. In its place, BAR and CN executed: (1) a "Junction Settlement Agreement," under which CN gave BAR's parent company $5 million in exchange for BAR's agreement to a haulage arrangement with CN in lieu of BAR's prior division of joint rate revenue for hauling CN cars between Fraser's plant and the CN interchange at St. Leonard, Canada; (2) BAR's and VBBC's grant to CN of overhead trackage rights (the Trackage Rights Agreement) between Madawaska and the Canadian border at VBBC milepost 0.31, a distance (in the U.S.) of approximately 23.03 miles; and (3) BAR's and VBBC's conveyance to CN's Class III subsidiary, the Waterloo Railway Company (Waterloo), of a "freight operating easement" (the ["Waterloo Easement"]) between the same points. The parties filed notices with the Board under 49 CFR 1180.2(d)(7) and 1150.41, respectively, for exemption

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which to decide the motion, that request is denied.

authority to allow them to implement the trackage rights and [easement] agreements. Separate notices of the trackage rights and [easement] exemptions were served on March 21, 2001, and published in the Federal Register at 66 FR 15941 (Mar. 21, 2001), in STB Finance Docket Nos. 34014 and 34015.[2]

On August 15, 2001, an involuntary Chapter 11 bankruptcy proceeding was filed against BAR. The United States Bankruptcy Court for the District of Maine (the Bankruptcy Court) granted an order for relief on December 4, 2001. A trustee in bankruptcy for BAR (the Trustee) was appointed on or about December 28, 2001.

On March 18, 2002, the Trustee filed a motion with the Bankruptcy Court seeking authority to reject all three agreements that precipitated the filing of the notices – the Junction Settlement Agreement, the Trackage Rights Agreement, and the [Waterloo Easeement]. In this motion, the Trustee argued that these agreements are burdensome to the estate and that their rejection will result in a higher purchase price being paid by the buyer of the estate's assets. The Trustee also expressed an intention to initiate this proceeding before [the STB] to terminate the trackage rights authorized in STB Finance Docket No. 34014.

On April 24, 2002, BAR's Trustee filed a petition with the Board to reopen and to revoke the exemptions granted in STB Finance Docket Nos. 34014 and 34015.

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On June 3, 2002, CN filed a supplemental reply . . . informing us of two new developments. One new development was that the Bankruptcy Court had stayed its proceedings pending completion of proceedings before the Board. The other new development was an announcement by the Montreal, Maine & Atlantic Railway, LLC (MMA) that it had signed an asset purchase agreement with the Trustee to purchase the assets of BAR and its affiliates.

Canadian Nat'l Ry. Co. – Trackage Rights Exemption – Bangor & Aroostook R.R. Co. and Van Buren Bridge Co., 2002 WL 1365812, at *1-*3 (Surface Transp. Bd. June 25, 2002) ("STB Decision") (footnotes omitted).

[2] The STB "accord[s] [its] decisions in exemption cases the same weight as [it does] licensing determinations made on the basis of full-scale applications." STB Decision at *4.

The STB went on to deny the Trustee's petition to reopen and revoke the exemptions on grounds "(1) that the Trustee's revocation request does not meet the standard of showing that revocation would advance the rail transportation policy criteria of 49 U.S.C. § 10101; (2) that the Trustee's petition to revoke the exemptions is misdirected because, unless we were also to find against CN in an adverse discontinuance case that has not yet been brought, revocation would not terminate CN's rights to operate over the BAR track at issue; and (3) that, even if we were to treat the Trustee's petition as a request for adverse discontinuance, there is no basis on the record now before us to grant such a request." *Id*. at *4.

Also of relevance:

1. By decision dated October 9, 2002 the Bankruptcy Court approved MMA's purchase of assets of BAR and the assumption and assignment of related agreements. *See* Order (1) Approving Asset Purchase Agreement; (2) Authorizing Sale of Assets to Montreal, Maine & Atlantic Railway LLC; and (3) Authorizing Assumption and Assignment of Related Agreements, attached as Exh. A to Motion To Dismiss. In so doing, the Bankruptcy Court noted that the parties' asset purchase agreement, as amended, included the following provision:

> 1.8 Supplemental Purchase Price. In the event that (1) the Bankruptcy Court enters an order approving the rejection by BAR and VBB of, and extinguishing all rights of CN to offer rail service by virtue of and over, that certain CN Junction Settlement Agreement and that certain CN Trackage Rights Agreement, each dated as of March 1, 2001, and each among Canadian National Railway Company ("CN"), BAR and VBB, and (2) a court of competent jurisdiction enters an order before January 1, 2005, that either (i) the sale of the BAR Assets is free and clear of that certain Waterloo Easement granted by BAR and VBB to Waterloo Railway Company, dated as of March 15, 2001 (the "Waterloo Easement"), or (ii) the Waterloo Easement is not capable of being exercised following the rejection by BAR of the CN Trackage Rights Agreement; and (3) all of the orders approving such rejection and extinguishment and the Sale Order have become final, nonappealable orders no longer subject to stay or to further judicial or administrative appeal or action (such event being referred to as the "Waterloo Easement Rejection"), then (a) if the Waterloo

> Easement Rejection occurs prior to Closing, MM&A shall pay to BAR, as a supplemental purchase price at Closing, the sum of $5 million, and (b) if the Waterloo Easement Rejection occurs after Closing but before January 1, 2005, then within 30 days of such Waterloo Easement Rejection, MM&A shall pay to BAR the sum of $5 million. All such amounts shall be paid without setoff, offset, or recoupment.

Id. at 3-4.

2. The Trustee's motion to reject the Junction Settlement, Trackage Rights and Waterloo Easement agreements (collectively, "Contracts") was converted to an adversary proceeding by order of the Bankruptcy Court entered orally on the record on May 7, 2003, as confirmed by order dated May 27, 2003. Complaint at 2, ¶ 1.

3. On June 17, 2003 the Hon. James B. Haines, chief judge of the Bankruptcy Court, held a telephonic pretrial conference with the parties in which he provided them with the benefit of his views on issues pivotal to the instant dispute. *See* Transcript of Telephonic Pretrial Conference Before the Honorable James B. Haines ("Haines Transcript"), attached as Exh. C to Motion To Dismiss.

4. On the same day, the Trustee filed his complaint in the instant adversary proceeding. *See id*. at 4; *see also* Procedural Order and Statement of Core/Non Core Character of Claims ("Procedural Order"), attached as Exh. D to Motion To Dismiss, at 2.

5. By order dated June 19, 2003 Judge Haines characterized the Trustee's ten-count Complaint as follows:

> Count I: This count seeks rejection of executory contract[s] and is core.[3]

[3] "'Proceedings arising under title 11' and 'arising in a case under title 11' are termed core proceedings, and matters that are merely related to a title 11 case are characterized as 'noncore proceedings.'" *In re Jackson Brook Inst., Inc*., 227 B.R. 569, 584 (D. Me. 1998). "Without the consent of the parties, the bankruptcy court is not empowered to enter final judgments or orders in noncore proceedings." *Id*.

Count II: Count II seeks a declaration of rights, specifically addressing the effect of contract rejection as requested in Count I. It is core.

Count III: This count seeks authority to discontinue the defendants' rights over portions of track pursuant [to] 11 U.S.C. § 1170. The count is core. I note, however, that the count does require ascertaining whether a so called "adverse abandonment" comes within the scope of § 1170. The statute's reach and the availability of the relief sought by the plaintiff in this action (issues that have been extensively briefed by the parties previously) are closely related to issues touching on the jurisdiction of the Surface Transportation Board. The plaintiff is seeking not to discontinue its own, existing service over a portion of rail line, but is seeking to "adversely abandon" defendants' rights to use plaintiff's track. Whether § 1170, which addresses "abandonment," encompasses "adverse abandonment" is an unresolved legal issue. Defendants' rights (which are the subject of the Trackage Agreement) have received regulatory approval by the Surface Transportation Board, and whether rejection of the Trackage Agreement would itself extinguish them is an uncertain question.

Count IV: Count IV seeks a declaration of such rights as may exist under the [Waterloo Easement], should the Trackage Agreement be rejected. The count is core.

Count V: Count V seeks avoidance of the [Waterloo Easement] as a preference under 11 U.S.C. § 547. It is core. The extent of relief available to the plaintiff, in terms of extinguishing rights over certain track, however, implicates the Surface Transportation Board's jurisdiction.

Count VI: This count seeks recovery of preferences and post-petition transfers. It is core.

Count VII: Count VII seeks avoidance of fraudulent transfers under the Bankruptcy Code. It is core.

Count VIII: This count seeks avoidance of fraudulent transfers under the Maine Uniform Fraudulent Transfer Act and is core.

Count IX: Count IX sets forth objections to claims. It is a core proceeding.

Count X: This count seeks turnover (return) of estate property. It is core.

As a supplement to the foregoing characterizations of the claims, I must add that the extent of relief sought by the plaintiff (i.e., ouster of the defendants – elimination of all defendants' rights to operate over certain track, as opposed to simple rejection of

> contracts) does, in my mind, raise issues concerning what relief is available in this court, and what relief is exclusively reserved to the Surface Transportation Board's jurisdiction. My preliminary analysis of the issues is articulated in some detail in the transcript of the telephonic pretrial conference conducted on June 17, 2003.

Procedural Order at 2-3 (citations omitted).

6. On June 25, 2003 CN filed a motion to withdraw reference to the Bankruptcy Court of the instant adversary proceeding. *See* Canadian National Railway Company's Motion To Withdraw the Reference, etc. (Docket No. 1). That motion was granted without objection on June 30, 2003. *See* Order Granting Canadian National Railway Company's Motion To Withdraw the Reference (Docket No. 3).

7. In opposing the instant motion, the Trustee represented that he expected to file an abandonment application with the STB on or about September 12, 2003. *See* Trustee's Opposition to Defendants' Motion To Dismiss, etc. ("Dismiss Opposition") (Docket No. 22) at 2 n.2. On October 6, 2003 the Trustee filed a copy of that STB adverse-abandonment application (dated October 6, 2003) in this court. *See* Docket No. 28.

III. Analysis

The Trustee suggests – correctly – that in the course of litigating the instant motion the Defendants revamped their key theory for dismissal. *See generally* Trustee's Surreply in Opposition to CN's Motion To Dismiss ("Surreply") (Docket No. 27).[4] The Defendants initially sought dismissal of the Complaint in its entirety for lack of subject matter jurisdiction.[5] *See* Motion To Dismiss at 4-9. However, in their reply

[4] The Trustee's motion to file a surreply was granted without objection on September 30, 2003. *See* Endorsement to Ancillary Motion.

[5] In the alternative, the Defendants requested dismissal of Count III of the Complaint for lack of subject matter jurisdiction or for failure to state a claim as to which relief can be granted and dismissal of Counts I-II, IV-VIII and X for failure to state a claim as to which relief can be granted. *See* Motion To Dismiss at 9-20.

memorandum, the Defendants argued that the court should defer to the expertise of the STB pursuant to the doctrine of primary jurisdiction. *See* Reply of Canadian National Railway Company and Waterloo Railway Company in Support of Motion To Dismiss ("Dismiss Reply") (Docket No. 24) at 9-11, 14.[6]

As the Trustee points out, these are two distinct (and irreconcilable) theories. *See* Surreply at 3-4. The doctrine of primary jurisdiction, which is grounded in prudential concerns, presupposes the existence of subject matter jurisdiction. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963) (noting that doctrine of primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. Court jurisdiction is not thereby ousted, but only postponed.") (citations and footnote omitted); *Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envtl. Prot.*, 196 F.3d 302, 304 (1st Cir. 1999) ("The doctrine of primary jurisdiction is a prudential doctrine developed by the federal courts to promote accurate decisionmaking and regulatory consistency in areas of agency expertise."); *Puerto Rico Mar. Shipping Auth. v. Federal Mar. Comm'n*, 75 F.3d 63, 67 (1st Cir. 1996) ("The doctrine of primary jurisdiction does not implicate the subject matter jurisdiction of the federal court.").

The Trustee urges the court to reject this afterthought argument not only because it is (in his view) wrong on the merits but also because it is too late. *See* Surreply at 3-4. Although the proffer of an argument for the first time in a reply memorandum typically counsels its disregard, s*ee, e.g., In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum), the Trustee in this instance has been afforded the

[6] The Defendants also continued to argue, in the alternative, that the majority of the counts of the Complaint fail to state a claim as to which relief can be granted. *See* Dismiss Reply at 11-14.

opportunity to join issue on the point by virtue of the grant, without objection by the Defendants, of his motion to file a surreply. Accordingly, I decline to disregard the new argument on that basis and turn to the merits.

That the Defendants shifted theories in this case is understandable. The fundamental problem with the court's consideration of the Complaint is not that it lacks the power to adjudicate the classic bankruptcy claims contained therein (*e.g.*, rejection of executory contracts, avoidance of allegedly fraudulent transfers, abandonment or discontinuance of rail lines pursuant to 11 U.S.C. § 1170) but rather that section 1170 is inapplicable, as a result of which the court is unable to grant the Trustee the full measure of relief he seeks.

The Trustee endeavors, via the instant Complaint, to capture for the benefit of the BAR and VBB estates the $5 million supplemental purchase price offered by MMA in exchange for freeing it from the constraints of the Contracts. MMA, in turn, cannot be entirely freed from those constraints absent authorization of the abandonment of the CN and Waterloo trackage rights approved by the STB: namely, CN's trackage rights over the Madawaska Line and Waterloo's easement in that line. As the Trustee essentially concedes, in the realm of STB-approved railroad trackage rights, abandonment can be accomplished solely via one of two routes: court approval (with the benefit of STB input) pursuant to 11 U.S.C. § 1170 or direct STB approval pursuant to 49 U.S.C. § 10903. *See* Surreply at 3; *see also, e.g.*, *Gibbons v. United States*, 660 F.2d 1227, 1233-34 & n.13 (7th Cir. 1981) (citing section 10903 for proposition that a "bankrupt railroad's right to withdraw its lines from service . . . has been qualified by the statutory requirement that a carrier obtain ICC [Interstate Commerce Commission] approval prior to the abandonment of rail service"; citing section 1170 for proposition that, nonetheless, "[u]nder certain limited circumstances, a bankrupt carrier may also obtain approval of service abandonments from the

reorganization court.").[7] The question, then, is whether section 10903 or section 1170 applies in the circumstances of this case.

Section 10903, part of title 49 (Transportation), subtitle IV (Interstate Transportation), part A (Rail), chapter 109 (Licensing) of the United States Code, provides in relevant part:

> **(a)(1)** A rail carrier providing transportation subject to the jurisdiction of the Board [STB] under this part who intends to –
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> **(A)** abandon any part of its railroad lines; or
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> **(B)** discontinue the operation of all rail transportation over any part of its railroad lines,
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> must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

49 U.S.C. § 10903(a)(1).[8]

Section 1170, part of title 11 (Bankruptcy), chapter 11 (Reorganization), subchapter IV (Railroad Reorganization) of the United States Code, provides in relevant part:

> **(a)** The court, after notice and a hearing, may authorize the abandonment of all or a portion of a railroad line if such abandonment is –
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> **(1)(A)** in the best interest of the estate; or
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> **(B)** essential to the formulation of a plan; and
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> **(2)** consistent with the public interest.

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[7] The ICC is the predecessor of the STB. *See Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 224-25 (3d Cir. 2003) (noting that "Congress on January 1, 1996 abolished the ICC and created the STB to perform functions similar to those previously assigned to the ICC.").

[8] Abandonment of any part of a line or discontinuance of the operation of all rail transportation over any part of a line is permitted "only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." 49 U.S.C. § 10903(d).

> **(b)** If, except for the pendency of the case under this chapter, such abandonment would require approval by the Board under a law of the United States, the trustee shall initiate an appropriate application for such abandonment with the Board. The court may fix a time within which the Board shall report to the court on such application.
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> **(c)** After the court receives the report of the Board, or the expiration of the time fixed under subsection (b) of this section, whichever occurs first, the court may authorize such abandonment, after notice to the Board, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing.

11 U.S.C. § 1170(a)-(c).[9]

The Trustee seeks to accomplish what is termed, in STB parlance, an "adverse abandonment" or "adverse discontinuance" – in other words, to oust a third party from its rights in a railroad line or its provision of a rail service. *See, e.g., Consolidated Rail Corp. v. ICC,* 29 F.3d 706, 708-09 (D.C. Cir. 1994) ("In a typical abandonment case a railroad requests the ICC to allow it to discontinue service over a particular line. If the ICC finds that the public convenience and necessity require or permit abandonment, it issues an abandonment certificate. In an adverse abandonment, the carrier wants to continue service; it is a third party who seeks the issuance of an abandonment certificate.") (citation omitted).[10]

Inasmuch as appears from the parties' briefs and my own legal research, the question of whether section 1170 encompasses an adverse-abandonment proceeding by a debtor against a non-debtor is one of

[9] Two other provisions of subchapter IV (Railroad Reorganization) are of note. Section 1165 obliges the court and the trustee, in applying section 1170, to "consider the public interest in addition to the interests of the debtor, creditors, and equity security holders." 11 U.S.C. § 1165. Section 1166 recognizes the interplay between title 11 and title 49, providing in relevant part: "Except with respect to abandonment under section 1170 . . . the trustee and the debtor are subject to the provisions of subtitle IV of title 49 that are applicable to railroads[.]" 11 U.S.C. § 1166.

[10] Technically, one "abandons" a railroad line and "discontinues" a rail-transportation service. *See* 49 U.S.C. § 10903(a)(1). The Trustee seeks in this case to do both; however, inasmuch as the distinction is not material to this recommended decision, I refer to both or either as "abandonment."

first impression. As a starting point in analysis, Judge Haines' comments at the parties' June 17, 2003 telephone conference are instructive:

> At this point, and after doing more than just looking at the surface of the pleadings, I'm unconvinced that 1170 pertains to the adverse abandonment. I say that for a number of reasons. First of all, the authorities and history cited by Canadian National have given me some pause in what would otherwise be a, quote, "plain language," close quote, application of 1170. 1170, I mean, we don't have a case where there's an operating railroad attempting to reorganize and it's bleeding financially because it's keeping up operations on a line where it's losing money. This is a case in which the term "abandonment" is applied in the adverse abandonment context by the STB, but it's not really an abandonment of a debtor's operations over railroad lines. And it looks to me like 1170 and the cases that have addressed it and the history have really spoken to the direct abandonment of operations over an unprofitable line by a debtor that's losing money and trying to reorganize. So, in other words, it may be termed "abandonment" or "adverse abandonment" in STB parlance, but, you know, there's also abandonments that a trustee undertakes in a Chapter 7 case. There's all kinds of abandonments, and this kind of abandonment, particularly when it's viewed in the facts of this case, where the debtor's no longer operating, it's sold to a third party, and it's not, like I say, losing money on a line but rather trying to undo an arrangement where somebody else is operating on their line, this just doesn't fit the notion or, I think, the statutory goal of 1170.

Haines Transcript at 9-10.

In his opposition to the instant motion, the Trustee reiterates his position that section 1170 by its plain terms applies in this case and that the court need not (indeed, should not) look beyond that language. *See* Dismiss Opposition at 5-7. As the First Circuit has noted:

> In construing the terms of a statute, we start with the statutory text, according it its ordinary meaning by reference to the specific context in which that language is used, and the broader context of the statute as a whole. When the statutory language is plain and unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. We will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity or some other extraordinary consideration, such as the prospect of yielding a patently absurd result.

Mullane v. Chambers, 333 F.3d 322, 330 (1st Cir. 2003) (citations, footnote and internal quotation marks omitted).

Section 1170 does not on its face limit its reach to abandonment of railroad lines of a debtor. The Trustee argues that the section hence unambiguously applies to "all or a portion of a railroad line" of any railroad anywhere in the United States (regardless whether owned or operated by a debtor). *See* Dismiss Opposition at 6. In the Trustee's view, this construction does not produce an absurd result or open the door to a "parade of horribles" given the statute's limitation that abandonments or discontinuances be approved only if either (i) "in the best interest of the estate" or "essential to the formulation of a plan" and (ii) "consistent with the public interest":

> If the Trustee sought abandonment of CN's lines or trackage rights into Chicago, for example, it would have a very difficult time demonstrating that keeping CN out of Chicago had any bearing on the interest of the estate, was essential to the formulation of a plan, or was consistent with the public interest. Notwithstanding CN's transparent "parade of horribles" argument, the Court's adherence to the plain language of section 1170 here with respect to its jurisdiction would not excuse the Trustee from the need to meet the requirements of 11 U.S.C. § 1170(a) in order to obtain discontinuance of CN's rights on the Madawaska Line.

Id. at 6-7.

Nonetheless, the Trustee's hypothetical itself demonstrates why his construction of section 1170 is open to question. Assuming *arguendo* that BAR still were in the rail-service business and desired to provide service to Chicago, would it not be "in the best interest of the estate" and potentially even "consistent with the public interest" to oust a non-debtor railroad (such as CN) from providing that rail service? Yet, the investiture of such broad-reaching power in the bankruptcy court to adjudicate the

trackage rights of non-debtor railroads is difficult to square with the overarching power of the STB as codified at 49 U.S.C. § 10903.

Thus, the placement of section 1170 in its broader context (as a Bankruptcy Code carveout from the plenary jurisdiction of the STB pursuant to section 10903) reveals an ambiguity – or, alternatively, the possibility of an absurd and unintended result – in the plain-meaning construction that the section encompasses adverse abandonments of non-debtor railroad lines. Recourse to the legislative history accordingly is appropriate.

Section 1170 was enacted as part of the comprehensive Bankruptcy Reform Act of 1978, the purpose of which was "to modernize the bankruptcy law by codifying a new title 11 that will embody the substantive law of bankruptcy and to make extensive amendments to title 28, Judiciary and Judicial Procedure, that will encompass the structure of the revised bankruptcy courts." S. Rep. No. 95-989, at 1 (1978) ("Senate Report"), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787. Section 1170 replaced section 77(o) of the Bankruptcy Act, formerly codified at 11 U.S.C. § 205(o). *See, e.g., id*. at 5795; *In re Eureka S. R.R., Inc*., 72 B.R. 813, 818 (N.D. Cal. 1987); *see also, e.g., In re Boston & Maine Corp*., 596 F.2d 2, 6 (1st Cir. 1979). Former section 205(o) provided, in relevant part:

> The trustee . . . shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting public interest, and shall [petition the court] for authority to abandon or sell any such property[.]

Former 11 U.S.C. § 205(o), *quoted in Eureka*, 72 B.R. at 818 n.6. However, subparagraph(o) was construed by the courts to necessitate, as "a prerequisite to action by a District Court," a finding by the ICC (predecessor to the STB) "that abandonment of specified trackage is or is not adverse to the public

interest[.]" *In re New York, Susquehanna & W. R.R. Co.*, 160 F.2d 29, 32 (3d Cir. 1946) ("We conclude that the determination of the question of whether or not trackage may be abandoned has been lodged by Congress solely in the Commission").[11]

As the Senate explained the change entailed in enactment of section 1170:

> Subchapter IV of chapter 11 deals with the reorganization of railroads. Under present law, railroad reorganizations are conducted under section 77 of the Bankruptcy Act, a statute enacted under the pressure of widespread railroad receiverships in the 1930's and essentially unchanged since 1935. Under the bill, the often complex and time consuming dichotomy between railroad and other business reorganizations is eliminated by incorporating railroad reorganizations into the pattern of business reorganizations generally, and including in subchapter IV only those additional provisions which are necessary to reflect the special characteristics of railroad reorganizations.
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> The incorporation of railroad reorganizations into the general reorganization provisions of the bill eliminates the cumbersome and duplicative procedure of section 77 under which plans of reorganization shuttled back and forth between the Interstate Commerce Commission (the "Commission") and the courts and proceedings were inevitably more time consuming and expensive. Under the bill, the bankruptcy court, rather than the Commission, assumes the primary responsibility for the reorganization proceedings.
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> In the case of a railroad being administered under title 11 the necessity to stem the bankrupt carrier's cash drain requires expeditious treatment of abandonment applications. The subchapter provides that the court rather than the Commission has the authority to authorize abandonments or discontinuances of rail service.

Senate Report at 11-12, *reprinted in* 1978 U.S.C.C.A.N. at 5797-98.

In its counterpart report, the House observed in relevant part:

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[11] The ICC, in turn, made such findings pursuant to former 49 U.S.C. § 1(18), predecessor to 49 U.S.C. § 10903. *See, e.g.*, *Susquehanna*, 160 F.2d at 33; *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981) ("The Commission's power to regulate abandonments by rail carriers stems from the Transportation Act of 1920, . . . which added to the Interstate Commerce Act a new § 1(18), recodified at 49 U.S.C. § 10903(a) . . . . That section stated in pertinent part: '[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.'").

> Subsection (A) permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan. This avoids the normal abandonment requirements of generally applicable railroad regulatory law. The authority to abandon or not to abandon lines of railroad is, of course, subject to the Fifth Amendment of the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise.

H.R. Rep. No. 95-595, at 423 (1977) ("House Report"), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6379. The Senate and House reports, together, make reasonably clear that in enacting section 1170 Congress was concerned with streamlining and accelerating the process of abandonment or discontinuance of a cash-strapped debtor's own rail lines – thereby, as the Senate Report put it, "stem[ming] the bankrupt carrier's cash drain."

That Congress had in mind the application of section 1170 to trackage rights of debtors rather than of third parties is further supported by:

1. Its use of the following language in enacting legislation in 1979 to apply section 1170 to the then-pending Milwaukee Railroad restructuring: that upon the occurrence of certain events or as of April 1, 1980, whichever occurred first, "the bankruptcy court may authorize the abandonment of lines of the Milwaukee Railroad pursuant to section 1170 of Title 11." 45 U.S.C. § 904(a)(1); *see also, e.g.*, H.R. Rep. 97-571(I), at 45 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4494, 4527 (noting that Milwaukee Railroad Restructuring Act ("MRRA") made section 1170 applicable to cases pending under section 77 of the old Bankruptcy Act).[12]

[12] The Trustee disputes that 45 U.S.C. § 904 reflects Congress's intention regarding anything other than the Milwaukee Railroad itself. *See* Dismiss Opposition at 9. He points out that in a companion section of the MRRA, Congress did not include language limiting the scope of section 1170 to lines "of debtors." *See id*.; 45 U.S.C. § 915(a) ("Notwithstanding (*continued on next page*)

2. The fact that the STB reasonably has construed sections 10903 and 1170, in tandem, to preserve its power pursuant to section 10903 to adjudicate an adverse-abandonment petition filed by a debtor railroad. *See Chicago, Rock Island & Pac. R.R. Co., Debtor (William M. Gibbons, Trustee) – Abandonment – Entire Sys.*, 363 I.C.C. 150, 170-71 (Interstate Commerce Comm'n May 23, 1980) (observing, in advisory report to bankruptcy court, "Rock Island has requested permission to abandon five subsidiaries, two of which are jointly owned with other railroads. Rock Island's subsidiaries which are wholly owned should be abandoned. However, where the subsidiary is jointly owned, as are Galveston Terminal and Oklahoma City Junction, neither we nor the Bankruptcy Court can permit their abandonment, since the subsidiary railroads are not considered bankrupt. Our jurisdiction over abandonment of these railroads can only be effectuated by the filing of an application under 49 U.S.C. § 10903. The Bankruptcy Court, on the other hand, has no jurisdiction over the Galveston Terminal or Oklahoma City Junction, since neither is bankrupt or a wholly owned subsidiary of Rock Island."); *see also, e.g., Arnold v. United Parcel Serv., Inc.*,136 F.3d 854, 864 n.8 (1st Cir. 1998), *recognized as abrogated on other grounds, Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp.2d 234 (D. Mass. 1999) ("[U]nless the plain language of a statute (or that language viewed in light of the legislative history) is clear, courts will defer to an interpretation of the statute by the agency charged with its enforcement if the agency's interpretation is a

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any other provision of law, in any case pending under section 77 of the Bankruptcy Act on November 4, 1979, the court may authorize the abandonment of lines of railroad pursuant to section 1170 of Title 11."). The Trustee speculates that in the case of the Milwaukee Railroad only its own lines were in issue, accounting for Congress's reference to "lines of the Milwaukee Railroad." *See* Dismiss Opposition at 9. While this is plausible, it seems unlikely that Congress intended to distinguish the Milwaukee Railroad from all other then-pending railroad reorganizations on that basis. More likely, the choice of language in 45 U.S.C. § 904 is reflective of Congress's understanding that section 1170 applied only to lines or service of debtor railroads. *See In re Valuation Proceedings Under Sections 303(c) & 306 of Regional Rail Reorganization Act of 1973*, 531 F. Supp. 1191, 1304 (Regional Rail Reorg. Ct. 1982) (describing 11 U.S.C. §§ 1170 and 1172 as "closely parallel[ing] the Milwaukee Act," including 45 U.S.C. § 904).

permissible construction of the statute's language and legislative history.") (citations and internal quotation marks omitted).[13]

In addition, at least one court has described adverse-abandonment proceedings involving railroads as an "unusual practice." *Consolidated Rail Corp*., 29 F.3d at 708. Congress accordingly likely did not perceive a need to address the possibility of such scenarios in railroad reorganizations.[14]

For these reasons, I am persuaded, as was Judge Haines, that despite its "plain language" section 1170 does not extend to the Defendants' attempts to adversely abandon trackage rights held by non-debtors CN and Waterloo. Therefore, the Trustee necessarily must look to the STB to render a decision on this question pursuant to section 10903. Accordingly, I recommend that the court:

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[13] The Trustee argues that the ICC's *Rock Island* decision is factually distinct inasmuch as the two non-debtor railroads with respect to which abandonment was sought had no trackage rights over the debtor's railroad lines. *See* Dismiss Opposition at 11-12. Nonetheless, by the ICC/STB's logic, the instant matter as well would be cognizable solely pursuant to section 10903 inasmuch as the trackage rights in issue are not those of a debtor or its wholly owned subsidiary. The Trustee also argues that, to the extent the ICC/STB has construed section 1170, its construction commands no deference inasmuch as it is not the agency charged with administering the statute. *See id*. at 12-13. I am unpersuaded. The STB is charged with administering section 10903 and with rendering advisory opinions pursuant to section 1170. Under either rubric, the STB is integrally involved with, and possesses expertise in, the abandonment of railroad lines. Moreover, the STB, as much as the court, is in a position to be called upon to draw the line between the two statutory regimes – as happened in *Rock Island*.

[14] The Trustee argues that Congress should be presumed to have been aware of *Susquehanna*, a 1946 case in which a debtor railroad sought via bankruptcy proceedings to abandon a non-debtor railroad's trackage rights in the debtor's lines. *See* Surreply at 2; *Susquehanna*, 160 F.2d at 30. However, the parties suggest, and my research confirms, that *Susquehanna* is the only reported decision containing such a fact pattern. *See* Motion To Dismiss at 6; Dismiss Opposition at 9. Even assuming *arguendo* that Congress was aware of *Susquehanna* in enacting section 1170 in 1978, it should also be presumed to have been aware that *Susquehanna* was the sole reported case in which such a situation had arisen. No doubt because of the paucity of caselaw on point, the parties also devote attention to the question of whether *Susquehanna* supports their respective positions. *See, e.g*., Motion To Dismiss at 6; Dismiss Opposition at 9-11; Dismiss Reply at 5. I do not find *Susquehanna* particularly illuminating. The Trustee posits that *Susquehanna* compels a conclusion that adverse-abandonment actions against non-debtors are cognizable pursuant to section 1170. *See* Dismiss Opposition at 9-10. However, the *Susquehanna* court was not asked to decide whether the trustee could press his adverse-abandonment action pursuant to the former 11 U.S.C. § 205(o); the only question presented was whether "the decision of the District Court [was] premature in rejecting the trustee's determination to disaffirm the agreements in advance of any certification by the Commission to the court in a proceeding inaugurated either by the trustee or by [the tenant railroads] under subparagraph o?" *Susquehanna*, 160 F.2d at 33. Thus, to the extent *Susquehanna* can be read as supporting a finding that adverse-abandonment actions against non-debtor railroads are cognizable pursuant to former section 205(o), it is dictum.

1. Dismiss Count III of the Complaint, which seeks relief pursuant to section 1170, for failure to state a claim on which relief can be granted; and

2. Pursuant to the doctrine of primary jurisdiction, defer adjudication of the remainder of the Motion To Dismiss pending the outcome of the Trustee's STB adverse-abandonment petition. While the Defendants press the court to dismiss the entire Complaint now (on their alternative grounds if necessary), *see* Dismiss Reply at 14-15, exhaustive consideration of their multiple bases for dismissal would prove a wasted effort were the STB to deny the Trustee's petition, thereby mooting virtually the entirety of the Complaint.

IV. Conclusion

For the foregoing reasons, I recommend that the court **GRANT** the Motion To Dismiss as to Count III of the Complaint and **DEFER** adjudication of the motion as it pertains to the remaining counts of the Complaint pending final disposition by the STB of the Trustee's adverse- abandonment petition.[15]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of October, 2003.

[15] Adoption of this recommended decision would moot two other pending motions that hinge on the applicability of section 1170, namely: Plaintiff's Motion for an Order Pursuant to 11 U.S.C. § 1170 Directing the Surface Transportation Board To Issue Report Within 60 Days of Filing of Abandonment Application (Docket No. 7), and Motion of Fraser Papers Inc. To Quash Subpoena Duces Tecum of Trustee of Bangor and Aroostook Railroad Company (Docket No. 15).

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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